FEB 22 2001

Nos. 00-596 and 00-597

Supreme Court
FILED
FEB 22 2001
CLERK

IN THE

Supreme Court of the United States

Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and U.S. Smokeless Tobacco Company,

Petitioners,

- and -

Altadis U.S.A. Inc., As Successor to Consolidated Cigar Corporation and Havatampa, Inc.; General Cigar Co., Inc.; John Middleton, Inc.; Lane Limited, As Successor To Tobacco Exporters International (USA) Ltd.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; and Swisher International, Inc.,

Petitioners,

v.

Thomas F. Reilly, Attorney General
of the Commonwealth of Massachusetts,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ADVERTISING FEDERATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

WALLACE S. SNYDER
JEFFRY L. PERLMAN
AMERICAN ADVERTISING FEDERATION
1101 Vermont Avenue, N.W.
Suite 500
Washington, D.C. 20005

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062

DANIEL E. TROY
Counsel of Record
KRISTINA R. OSTERHAUS
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. FULL PROTECTION OF COMMERCIAL SPEECH IS CONSISTENT WITH THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT AND THE PREVALENCE AND IMPORTANCE OF ADVERTISING AT THE TIME OF THE FRAMING. 5

A. Advertising Was an Integral Part of the "Press" in Colonial America. 5

B. The Absence of Advertising Restrictions Is Consistent with the Colonial Conception of a "Free Press" That Included Advertising. 8

1. The challenges to early Stamp Acts evidence the colonial conception of a "free press" including advertising. 8

2. State trade regulations restricting unlawful products and services only show that the colonial conception of a "free press" included advertising. 11

3. Common law exceptions to free commercial speech involving false or misleading speech show that the colonial conception of a "free press" included advertising. 15

TABLE OF CONTENTS—Continued

4 Fully protecting advertising is consistent with the Framers' political philosophy, which equated liberty and property. 16

II. THE PERVASIVENESS OF ADVERTISING AND STATE LEGISLATIVE PRACTICE AT THE TIME OF PASSAGE OF THE FOURTEENTH AMENDMENT ARE CONSISTENT WITH THE VIEW THAT COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION. 19

A. Commercial Speech Was an Integral Part of American Life During Reconstruction. 19

B. State Legislative Practice During Reconstruction Is Consistent with Full First Amendment Protection for Truthful Commercial Speech Promoting Lawful Products and Services. 21

III. LESSER PROTECTION FOR COMMERCIAL SPEECH IS A TWENTIETH-CENTURY PHENOMENON THAT HAS ITS ORIGINS IN A DISENCHANTMENT WITH ECONOMIC LIBERTIES AND CONFUSION WITH ECONOMIC SUBSTANTIVE DUE PROCESS. 23

A. The Pervasiveness of Advertising Grew in the Early Twentieth Century. 23

B. Disenchantment with Advertising Became Apparent as a Result of Reform Movements and the Great Depression. 24

TABLE OF CONTENTS—Continued

C. The Incorrect Association of Advertising and Economic Liberties Led to the Misguided Distinction Between Commercial and Noncommercial Speech. 26

IV. THIS PROPOSED INTERPRETATION OF THE FIRST AMENDMENT WILL NOT DRAMATICALLY ALTER THE COURT'S FIRST AMENDMENT JURISPRUDENCE. 28

V. MASSACHUSETTS' RESTRICTIONS ON TRUTHFUL MESSAGES ABOUT A LAWFUL PRODUCT ARE PROHIBITED BY THE FIRST AMENDMENT. 29

TABLE OF AUTHORITIES

CASES **Page**

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 4, 28

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989) 3

Borrekins v. Bevan, 3 Rawle 23 (Pa. 1831) 13

Central Hudson Gas & Electric Corp v. Public Service Commission, 447 U.S. 557 (1980) 3, 28, 29

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 28

Edenfield v. Fane, 507 U.S. 761 (1993) 28

Gerawan Farming, Inc. v. Lyons, 101 Cal. Rptr. 2d 470 (2000) 5

Greater New Orleans Broadcasting Association v. FCC, 527 U.S. 173 (1999) 28

Grosjean v. American Press Co., 297 U.S. 233 (1936) 11

Halter v. Nebraska, 205 U.S. 34 (1907) 26

Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 837 (5th Cir. 1989) 29

Ex parte Jackson, 96 U.S. 727 (1877) 22

The King v. Higgins, 102 Eng. Rep. 269 (K.B. 1801) 16

Needham v. Proffitt, 41 N.E. 606 (Ind. 1942) 27

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) 16

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 28

TABLE OF AUTHORITIES—Continued

Page

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 28

Seattle v. Proctor, 48 P.2d 238 (Wash. 1935) 27

State ex rel. Booth v. Beck Jewelry Enterprises, Inc., 41 N.E.2d 622 (Ind. 1942) 27

Stromberg v. California, 283 U.S. 359 (1931) 26

United States v. Carolene Products Co., 304 U.S. 144 (1938) 27

Valentine v. Chrestensen, 316 U.S. 52 (1942) 3, 27

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 29

Ware v. Ammon, 278 S.W. 593 (Ky. Ct. App. 1925) 27

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 27

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

Act of June 8, 1872, ch. 335, 17 Stat. 283 22

U.S. Constitution, Amendment IX 11

U.S. Constitution, Amendment X 11

STATE STATUTES

Act for the Better Making and Measuring of Malt, 1700, The Laws of the Commonwealth of Massachusetts (1807) 12

TABLE OF AUTHORITIES—Continued

Page

Act Enabling the Town-Councils of Each Town In This State to Grant Licenses, 1728, The Public Laws of the State of Rhode Island and Providence Plantations (1798) 14

Act of February 13, 1797, The Laws of the State of New Jersey (1800) 13

Act Against Horse Racing, 1820, A Digest of the Acts of the General Assembly of Pennsylvania (1841) 14

Act to Lay A Duty on Strong Liquors, and For Regulating Inns and Taverns, 1801, Laws of the State of New York (1802) 12

Act for the More Effectual Suppressing and Preventing of Lotteries, 1762, A Digest of the Acts of the General Assembly of Pennsylvania (1841) 14

Act to Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rosin, Turpentine, Beef, Pork, Shingles, Stoves and Fire-wood, and to Regulate the Weighing of the Merchandise in this Province, 1746, The Public Law of the State of South Carolina (1790) 13

Act to Prevent Horse Racing, 1803, The Public Statute Laws of the State of Connecticut (1808) 14

Act to Prevent Private Lotteries, to remit certain Penalties, and to Repeal the Acts therein Mentioned, 1783, Laws of the State of New York (1802) 13

Act for the Prevention of Lotteries, 1792, The Laws of Maryland (1811) 13

TABLE OF AUTHORITIES—Continued

Page

Act for Punishing and Preventing Oppression, 1635 (amended 1730), The Public Statute Laws of Connecticut (1808) 12

Act to Regulate the Exportation of Potash and Pearl Ash, 1792, The Laws of Maryland (1811) 12

Act to Regulate Flax-Feed, Pot-ash and Pearl Ash for Exportation, 1785, The Laws of the State of New Hampshire (1797) 12

Act to Regulate the Practice of Physic and Surgery, 1783, Laws of the State of New Jersey (1783) 13

Act Regulating the Admission of Attornies, 1785, The Laws of the Commonwealth of Massachusetts (1785) 13

Act for Regulating the Exportation of Tobacco and Butter, and the Weight of Onions in Bunches, and the Size of Lime-Casks, 1785, The Laws of the Commonwealth of Massachusetts (1807) 12

Act Regulating Licensed Houses, 1791, The Laws of the State of New Hampshire (1797) 12

Act for Regulating Ordinaries, Houses of Entertainment and Retailers of Spirituous Liquors, 1798, The Public Acts of the General Assembly of North Carolina (1804) 12

Act for the Suppression of Lotteries, 1785, The Laws of the Commonwealth of Massachusetts (1807), *amended by* Act of Feb. 28, 1801 14

Act for the Suppressing of Lotteries, 1791, The Laws of the State of New Hampshire (1805) 13

Act for Suppressing and Preventing of Private Lotteries, 1762, The Public Law of the State of South Carolina (1790) 14

TABLE OF AUTHORITIES—Continued

Page

Bill of Rights art. 22 (N.H. 1783) 12

California Penal Code § 311(4) (1872) 22

California Penal Code § 317 (1872) 21

California Penal Code § 323 (1872) 21

Collection of All Such Acts of the General Assembly of Virginia (1803) 11

Compiled Laws of Kansas ch. 31, art. 14, § 338 (1885) 22

Compiled Laws of Kansas ch. 31, § 342 (1885) 21, 22

Compiled Laws of Nevada § 2498 (1873) 21

Compiled Laws of the Territory of Utah, Penal Code tit. 9, ch. 8, § 162(4) (1876) 21, 22

Compiled Laws of the Territory of Utah § 2002 (1876) 21

Connecticut General Statutes tit. 12, ch. 2, § 25 (1866) 21

Connecticut General Statutes tit. 12, § 150 (1866) 21

Declaration of Rights (Del. 1776) 12

Declaration of Rights (Md. 1776) 12

Declaration of Rights (Mass. 1780) 12

Declaration of Rights (N.C. 1776) 12

Declaration of Rights (Pa. 1776) 12

Declaration of Rights § 7 (S.C. 1778) 12

Declaration of Rights ch. I, art. XIII (Vt. 1793) 12

Declaration of Rights (Va. 1776) 12, 16

Delaware Revised Statutes ch. 98, v. 12, § 6 (1874) 21

TABLE OF AUTHORITIES—Continued

Page

Digest of the Acts of the General Assembly of Pennsylvania (1841) 11

Digest of Laws of Florida ch. 59, § 10 (1881) 21

Digest of Laws of Florida ch. 80, § 4 (1881) 21

Georgia Constitution of 1798 art. IV, § V 12

Iowa Code § 4043 (1873) 21

Kentucky Revised Statutes ch. 28, art. 21, § 4 (1860 & Supp.) 21

Laws of Maryland (1811) 11

The Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 23, 1807 (1807) 11, 14

The Laws of the State of New Hampshire (1797) 11

The Laws of the State of New Jersey (1800) 11

Laws of the State of New York (1802) 11

Laws of the State of Vermont (1797) 11

Maine Revised Statutes tit. 11, ch. 128, § 13 (1884) 21

Maryland Code art. 30, § 114 (1860) 21

Maryland Laws ch. 179, § 2 (1868) 21

Massachusetts General Statutes ch. 165, § 10 (1860) 21

Mississippi Revised Code § 2605 (1871) 21

New Jersey Revised Statutes, Crimes § 44 (1874) 21

New York Revised Statutes ch. 20, tit. 8, § 53 (1875) 21

New York Revised Statutes pt. 4, ch. I, tit. 6, § 77 (1875) 22

TABLE OF AUTHORITIES—Continued

Page

New York Revised Statutes pt. 4, ch. 1, tit. 6, § 78 (1875) 21

Ohio Revised Statutes ch. 2732, § 1 (1860 & Supp.) 21

Oregon General Laws, Crim. Code, ch. 8, § 661 (1874) 21

The Public Acts of the General Assembly of North Carolina (1804) 11

The Public Law of the State of South Carolina (1790) 11

The Public Laws of the State of Rhode Island and Providence Plantations (1798) 11

The Public Statute Laws of the State of Connecticut (1808) 11

Rhode Island General Statutes ch. 232, § 23 (1872) 21

Vermont General Statutes ch. 119, § 7 (1870) 21

West Virginia Code ch. 149, § 11 (1868) 22

MISCELLANEOUS

Bruce Ackerman, *Constitutional Politics/ Constitutional Law*, 99 Yale L.J. 453 (1989) 25

3 *William Blackstone Commentaries* (1769) 15

4 *William Blackstone Commentaries* (1769) 15

David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429 (1983) 12

D. Boorstin, *The Americans: The Colonial Experience* (1958) 8

TABLE OF AUTHORITIES—Continued

Page

6 *The Complete Anti-Federalist* (Herbert J. Storing ed., 1981) 10

Verner W. Crane, *Introduction to Benjamin Franklin's Letters to the Press, 1758-1775* (Verner W. Crane ed., 1950) 5

Edwin Emery & Michael Emery, *The Press and America* (1978) 5

G. Allen Foster, *Advertising: Ancient Market Place to Television* (1967) 20

George French, *20th Century Advertising* (1926) 23

Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L. Rev. 1133 (1931) 13

Richard Hofstadter, *The Age of Reform* (1955) 24

Carol S. Humphrey, *"That Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press, 1783-1788*, 14 Journalism Hist. 34 (1987) 11

Matthew Josephson, *The Robber Barons* (1934) 24

Morton Keller, *Affairs of State* (1977) 19

Hurnard J. Kenner, *The Fight for Truth in Advertising* (1936) 24

Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525 (1987) 27

A. Lee, *The Daily Newspaper in America* (1937) 7

Letter XVI, Jan. 20, 1788, *in An Additional Number of Letters from the Federal Farmer to the Republican* (1962) 18

TABLE OF AUTHORITIES—Continued

Page

Leonard W. Levy, *Emergence of a Free Press* (1985) 12

Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* (Leonard W. Levy ed., 1996) 17

John Locke, *The Second Treatise on Government* (Thomas P. Peardon ed., Bobbs-Merrill 1st ed. 17th prtg.1975) (1690) 16

James Madison, 14 *Papers of James Madison* (Robert A. Rutland & Thomas Mason eds., 1983) 18

John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49 (1996) 16

Kent R. Middleton, *Commercial Speech in the Eighteenth Century, in Newsletters to Newspapers: Eighteenth Century Journalism* 277 (Donovan H. Bond & W. Reynolds McLeod eds., 1977) 6, 8

James C. Mohr, *Abortion in America* (1978) 21

Frank Luther Mott, *American Journalism—A History of Newspapers in the United States Through 250 Years: 1690-1960* (3d ed. 1963) 6, 7, 19

Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257 (1985) 10

15 *The Papers of Thomas Jefferson* 367 (J. Boyd ed., 1958) 15

Rudolph J.R. Peritz, *Competition Policy in America, 1888-1992* (1996) 26

TABLE OF AUTHORITIES—Continued

Page

Frank Presbrey, *The History and Development of Advertising* (1929) ..... *passim*

The Press and the American Revolution (B. Bailyn & J.B. Hench eds., 1980) 9

Clinton Rossiter, *Seedtime of the Republic* (1953) 17

Arthur Schlesinger, Sr., *Prelude to Independence: The Newspaper War on Britain 1764-1776* (1966) 9, 10

Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (1988) 7, 17, 18

Joseph Story, *Equity Jurisprudence* (1836) 15

John Trenchard & Thomas Gordon, 1 *Cato's Letters* (Ronald Hamow ed., Liberty Classics ed. 1995) 17

Daniel E. Troy, *Advertising: Not Low Value Speech*, 16 Yale J. Reg. 85 (1999) 5

William F. Walsh, *A History of Anglo-American Law* (1932) 25

James Playstead Wood, *The Story of Advertising* (1958) ..... *passim*

2 *Writings of Benjamin Franklin* (Albert Henry Smith ed., 1907) 9

Lawrence C. Wroth, *The Colonial Printer* (1938) 7

David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699 (1991) 25, 27

This brief is respectfully submitted pursuant to Rule 37 urging the Court to reverse the decision below of the United States Court of Appeals for the First Circuit on the grounds that Massachusetts' limitations on the public display of tobacco advertising violate the Petitioners' rights under the First Amendment to the Constitution of the United States.[1]

INTEREST OF AMICUS CURIAE

The *amici* herein represent thousands of advertising agencies, advertisers, and others who participate in the advertising industry, as well as business organizations and individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that *amici* present their views to the Court. The *amici* are:

The American Advertising Federation ("AAF"), a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are producers and advertisers of consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include: twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

The Chamber of Commerce of the United States of America ("Chamber"), the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of more than three million businesses and organizations, with 140,000 direct members of every size, in every business sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases

---

[1] Counsel for both Petitioner and Respondents have consented to the participation of the *amici* in this case, as evidenced by letters filed with the Court pursuant to Supreme Court Rule 37. No party wrote or financially contributed to the preparation of this brief.

involving issues of national concern to American business. This brief is filed because full First Amendment protection to truthful commercial messages about lawful products and services is a matter of profound importance to the Chamber's members.

SUMMARY OF ARGUMENT

The text and history of the First Amendment, as well as the "long accepted practices of the American people," support the view that truthful commercial messages about lawful products and services should be accorded the same constitutional protection as is noncommercial speech. The text, of course, does not distinguish between commercial and noncommercial aspects of the press. The lack of a distinction for constitutional purposes is confirmed by the practice of state legislatures at the time the Bill of Rights was ratified. Although states regulated trade, the only restrictions on advertising concerned the promotion of unlawful activities. This absence of state regulation is consistent with the colonial conception of a "free press," which included advertising, and with the Framer's political philosophy, which equated liberty and property. Full protection of commercial speech is also consistent with the history of the First Amendment, which was adopted in part to bar Stamp Acts that imposed taxes directly on advertising.

Advertising grew essentially unchecked and unregulated throughout the nineteenth century. While the number of states and statutes increased, advertising was barred only where it publicized unlawful products, services, or activities. In addition, towards the end of the century, some restrictions limiting false and misleading advertising were adopted. This Court's treatment of truthful advertising during and immediately after Reconstruction did not distinguish between the treatment accorded other forms of speech.

The Progressive Era witnessed both an increase in the power of advertising and attempts to limit it. But even these attempts overwhelmingly focused on ensuring that advertising was truthful and not misleading. During this time, courts analyzed constraints on commercial speech under the rubric of substantive due process. This confusion of categories caused the Supreme Court

in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to erroneously treat restrictions on advertising as economic regulations subject only to rational basis scrutiny.

That error, which is in part perpetuated by this Court's continued distinction between commercial and noncommercial speech, conflicts with the "long accepted practices of the American people." Those practices—particularly state legislative practice at the times the First and Fourteenth Amendments were ratified—support the contention that truthful commercial messages about lawful products and services are entitled to full First Amendment protection. Under that standard, the advertising restrictions at issue here are plainly unconstitutional.

ARGUMENT

This case involves a challenge to Massachusetts' restrictions prohibiting virtually all outdoor advertising of tobacco products (including indoor advertising visible from the street) within a broadly defined distance of any "park," "playground," or "school," as well as certain point-of-sale advertising regardless of its outdoor visibility. These rules apply even if the ads are truthful, even though they concern a lawful product, and even if most of the people who are exposed to a particular advertisement are adults. Massachusetts argues that these regulations are constitutional because of the need to protect children from positive images of tobacco products. The State's argument stems from the perception that commercial speech occupies some "subordinate position in the scale of First Amendment values." *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). This "subordinate position" is exemplified by this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Amici* demonstrate herein that, throughout most of this nation's history, the American people made no distinction between commercial and noncommercial speech.

Amicus AAF previously addressed the importance of advertising to the historical development of the American press and the concept of free speech. *See, e.g.*, Brief of *Amici Curiae* American Advertising Federation, *et al.*, *44 Liquormart, Inc. v.*

Rhode Island, 517 U.S. 484 (1996) (filed July 6, 1995). Because those points were not fully addressed in the *44 Liquormart* opinion, *amici* bring them again to the Court's attention. In *44 Liquormart*, the Court acknowledged the importance of historical context in unanimously striking down a state prohibition on advertising of liquor prices. *See id.* at 495 (plurality opinion of Stevens, Kennedy, Souter & Ginsburg, J.J.). Justice Thomas, relying in part on the historical analysis of *amici*, rejected the notion that there was any "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 522 (Thomas, J., concurring in part and concurring in the judgment) (citing Brief of *Amici*, American Advertising Federation, *et al.*).

Justice Scalia, concurring in the judgment, noted his "discomfort with the Central Hudson test," and his "aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them." *Id.* at 517 (Scalia, J., concurring in the judgment). Justice Scalia found the historical material submitted by AAF, *et al.*, "consistent with First Amendment protection for commercial speech, but certainly not dispositive." *Id.* He stated that "the long accepted practices of the American people" were central to interpreting the First Amendment, including (1) state legislative practices at the time the First Amendment was adopted; (2) state legislative practices at the time of adoption of the Fourteenth Amendment; and (3) "any national consensus that had formed regarding state regulation of advertising after the Fourteenth Amendment, and before this Court's entry into the field." *Id.* at 517-18.

In this brief, *amici curiae* review the relevant history in an effort to address these issues. The *amici* respectfully submit that the state legislative history and practice, like the available evidence surrounding the understanding of the generation of the Framers, support the proposition that, until relatively recently, the American people did not recognize a distinction in the protections afforded "commercial" and "noncommercial" speech, other than

the advertising of illegal activities and the protections afforded against fraudulent or misleading claims.[2]

I. FULL PROTECTION OF COMMERCIAL SPEECH IS CONSISTENT WITH THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT AND THE PREVALENCE AND IMPORTANCE OF ADVERTISING AT THE TIME OF THE FRAMING.

The development of a free press and of a commercial, advertising-driven press are inextricably linked. *See* Verner W. Crane, *Introduction to Benjamin Franklin's Letters to the Press, 1758-1775,* at xi, xvi (Verner W. Crane ed., 1950) ("It was a commercial age, and it produced a commercial press."). As a result, the modern distinction between "commercial" messages and other forms of speech would not have occurred to colonial Americans.

A. Advertising Was an Integral Part of the "Press" in Colonial America.

The interrelationship between editorial and advertising content in the eighteenth century press illustrates the fallacy of differentiating for constitutional purposes between commercial and noncommercial speech. American newspapers began to emerge only as colonial business and industry began to grow. *See* Edwin Emery & Michael Emery, *The Press and America* 18 (1978). As small industries developed a need to inform the public of their wares, printers began publishing newspapers to spread that information. As one commentator observed, "[w]ell before 1800 most English and American newspapers were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising." James Playstead Wood,

---

[2] For a more comprehensive discussion of the historical origins of the First Amendment and its application to commercial speech, *see* Daniel E. Troy, *Advertising: Not Low Value Speech*, 16 Yale J. Reg. 85 (1999). The California Supreme Court recently relied on the historical evidence presented here and in that article to find commercial speech entitled to full protection under the California Constitution. *See Gerawan Farming, Inc. v. Lyons*, 101 Cal. Rptr. 2d 470 (2000).

The Story of Advertising 85 (1958). Advertising was a major impetus and means for establishing regularly published newspapers in colonial America.

The majority of advertisements appearing in colonial newspapers would be considered "commercial speech" today. "The colonial press regularly carried reputable medical advertisements, as well as those for books, cloth, empty bottles, corks, and other useful goods and services." Kent R. Middleton, *Commercial Speech in the Eighteenth Century, in Newsletters to Newspapers: Eighteenth-Century Journalism* 277, 282 (Dononvan H. Bond & W. Reynolds McLeod eds., 1977). Without these advertisements, the colonial press so important to the Revolutionary cause would have been less vibrant, if it existed at all because, like today, "[a]dvertising represented the chief profit margin in the newspaper business." Frank Luther Mott, *American Journalism—A History of Newspapers in the United States Through 250 Years: 1690-1960* 56 (3d ed. 1963).

Among the goals of the first attempted colonial newspaper was the promotion of "Businesses and Negotiations." *Publick Occurrences, Both Foreign and Domestick*, Sept. 25, 1690, at 1, *quoted in* Frank Presbrey, *The History and Development of Advertising* 119 (1929). The inaugural issue of the first successful American newspaper contained the following solicitation:

> This News-Letter is to be continued Weekly, and all Persons who have Houses, Lands, Tenements, Farms, Ships, Vessels, Goods, Wares or Merchandise, &c to be Sold or Let; or Servants Run-Away, or Goods Stole or Lost; may have the same inserted at a Reasonable Rate.

Boston Newsletter, Apr. 24, 1704, *quoted in* Wood, *supra*, at 45. The next week's issue of the *Boston Newsletter* contained paid entries that sought the return of two lost anvils, offered a bounty for capturing a thief, and listed a "very good Fulling Mill to be Let or Sold" in Oyster Bay, New York. *Id.* at 45-46.

When the *New Hampshire Gazette* was launched in 1756, its publisher said that the paper would:

> contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and other useful Arts, and promote the public Welfare in any Respect.

New Hampshire Gazette, Oct. 7, 1756 *quoted in* Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 49 (1988). True to its word, the *Gazette*, like the other newspapers of its day, carried everything from price lists to political philosophy. *See* Lawerence C. Wroth, *The Colonial Printer* 234 (1938). Often, more than half of the standard colonial newspaper was taken up by advertising. In 1766, 70% of Hugh Gaine's *New-York Mercury* consisted of advertising. *See* A. Lee, *The Daily Newspaper in America* 32 (1937).

The first daily newspaper in the United States was established in 1784 primarily as a medium for advertising. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with advertisements. *See* Presbrey, *supra*, at 161. The name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. The Boston, New York, and Philadelphia newspapers, like most dailies in these years, "used page one for advertising, sometimes saving only one column of it for reading matter." Mott, *supra*, at 157.

Also, for much of the colonial era, newspapers did not use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as of equal

interest to readers and treated the same. *See* Middleton, *supra*, at 281. As one advertising historian observed:

> Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.

Presbrey, *supra*, at 154. Advertisements were also thought to have independent value in educating and informing the reading public. In the words of prominent printer-historian Isaiah Thomas, editor of a pro-Revolutionary newspaper:

> [A]dvertisements are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810), *quoted in* D. Boorstin, *The Americans: The Colonial Experience* 328 (1958). As a source of information to the population and income to colonial printers, advertising was influential and plentiful during the latter part of the colonial era.

B. The Absence of Advertising Restrictions Is Consistent with the Colonial Conception of a "Free Press" That Included Advertising.

1. The challenges to early Stamp Acts evidence the colonial conception of a "free press" including advertising.

Given the eighteenth-century equation of liberty and property and the prevalence of advertising in colonial America, it is not

surprising that the very idea of a free press evolved in close connection with the development of advertising. Indeed, one of the major catalysts of the American Revolution involved a defense of advertisements.

As this Court has recognized, one of the best-known statements in defense of a free press—Benjamin Franklin's famous *Apology for Printers*—was written in response to an attack on an advertisement printed by Franklin.[3] Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, Franklin's *Apology* contended that "Printers are educated in the Belief that when Men differ in opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* 174 (Albert Henry Smith ed., 1907). To Franklin, even those "opinions" in advertisements should be "heard by the Publick." Thus, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on a classic example of what is now called commercial speech.

In addition, the British Stamp Act of 1765 assessed a tax on each printed copy of a newspaper and added a two shilling tax for each advertisement therein. As one commentator noted, "[B]y any standard [this amount] was excessive, since the publisher himself received only from 3 to 5 [shillings] and still less for repeated insertions." Arthur Schlesinger, Sr., *Prelude to Independence: The Newspaper War on Britain 1764-1776* 68

---

[3] In 1731, Benjamin Franklin printed a politically incorrect advertising notice that was distributed as a stand-alone commercial handbill. The paper proposed a commercial transaction by seeking additional freight and passengers for a ship. At the bottom of the advertisement was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin* 176 (Albert Henry Smith ed., 1907). This handbill outraged the local clergy (the "Black Gowns"). In response to attacks, Franklin published his *Apology* which was at that time, "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, "Printers and the American Revolution," *in The Press and the American Revolution* 20 (B. Bailyn & J.B. Hench eds., 1980).

(1966). This tax galvanized the colonial press against the British government:

> Stamp duties also, imposed on every *commercial* instrument of writing—on *literary productions*, and, *particularly*, on *newspapers*, which of course, will be a great discouragement to trade; an obstruction to *useful knowledge* in *arts, sciences, agriculture, and manufactures*; and a prevention of *political information* throughout the states.

Objections by A Son of Liberty, New York J., Nov. 8, 1787, *reprinted in* 6 *The Complete Anti-Federalist* 34, 36 (Herbert J. Storing ed., 1981) (emphasis in original). The opposition of newspapers was based largely, if not primarily, on their concern that the tax encroached on the freedom of expression.[4] Thus, the repeal of the Stamp Act of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

After the Revolution, and only five years after adopting a state constitution explicitly guaranteeing freedom of the press, Massachusetts enacted a similar stamp tax on newspapers and newspaper advertisements. *See* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 264 (1985) (citing Clyde A. Duniway, *The Development of Freedom of Press in Massachusetts* 132-36 (1966)). These taxes were widely denounced as, in printer Isaiah Thomas's words, an "unconstitutional restraint on the Liberty of the Press." Isaiah Thomas, Essex J., Apr. 19,

---

[4] In reacting to the Stamp Act, the Town of Worcester directed its representatives in the Massachusetts Assembly to "take special care of the LIBERTY OF THE PRESS." Schlesinger, *supra*, at 70; *see also* Conn. Gazette, *quoted in id.* (enjoining its readers that "[t]he press is the test of truth, the bulwark the public safety, the guardian of freedom, and the people ought not to sacrifice it"); New York Gazette or Wkly Post-Boy, Nov. 7, 1765, *quoted in id.* at 77 (flaunting its motto, "The United Voice of all His Majesty's *free* and *loyal* subjects in America—LIBERTY, PROPERTY, and no STAMPS.") (emphasis in original).

1786, *quoted in* Carol S. Humphrey, *"That Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press, 1783-1788*, 14 Journalism Hist. 34, 37 (1987). The 1786 repeal of the ad tax was considered a triumph for press freedom. *Id.*; *see also Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936) (noting that "[t]he framers were likewise familiar with the then recent Massachusetts episode; and . . . that occurrence did much to bring about the adoption of the [First Amendment]").

2. State trade regulations restricting unlawful products and services only show that the colonial conception of a "free press" included advertising.

The practices of state legislatures around the time of the First Amendment's ratification further evidence that the Framers' generation did not distinguish between the constitutional status of commercial and noncommercial speech.[5] Indeed, state statutes in effect at this time did not restrict truthful commercial messages about lawful products or services.[6] Rather, consistent with the

---

[5] All powers not delegated to Congress were reserved to the people and the states. *See* U.S. Const. amends. IX, X. The First Amendment explicitly limited Congress's authority over speech and the press. As such, it is unlikely that the federal government was granted greater power to restrict speech than existed in the states. The fact that, as discussed below, state legislatures did not regulate truthful advertising of lawful products and services suggests that the federal government could not regulate such speech because advertising was regarded as within "the freedom of speech and of the press."

[6] This conclusion rests upon a review of the compilations of ratification-era statutes for each state closest in date to 1791. The Public Statute Laws of the State of Connecticut (1808); Laws of Maryland (1811); The Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 23, 1807 (1807); The Laws of the State of New Hampshire (1797); The Laws of the State of New Jersey (1800); Laws of the State of New York (1802); The Public Acts of the General Assembly of North Carolina (1804); Digest of the Acts of the General Assembly of Pennsylvania (1841); The Public Laws of the State of Rhode Island and Providence Plantations (1798); The Public Law of the State of South Carolina (1790); Laws of the State of Vermont (1797); Collection of All Such Acts of the General Assembly of Virginia (1803). All compilations

constitutions of the ten states that explicitly protected the freedom of the press,[7] advertising was limited only when used to promote products, services, or activities that were themselves unlawful.

Early statutes show efforts to regulate merchants and shopkeepers,[8] liquor and taverns,[9] potash,[10] malt,[11] a variety of commodities,[12] attorneys,[13] and doctors.[14] Among other things,

---

(..continued)
are available at The Edward Bennett Williams Law Library, Georgetown University Law Center. Contemporaneous compilations for Delaware and Georgia were unavailable.

[7] Declaration of Rights para. 23 (Del. 1776); Ga. Const. of 1798 art. IV, § V; Declaration of Rights para. 38 (Md. 1776); Declaration of Rights para. XVI (Mass. 1780); Bill of Rights art. 22 (N.H. 1783); Declaration of Rights para. 25 (N.C. 1776); Declaration of Rights para. 12 (Pa. 1776); Declaration of Rights § 7 (S.C. 1778); Declaration of Rights ch. I, art. XIII (Vt. 1793); Declaration of Rights para. 12 (Va. 1776). Pennsylvania and Vermont connected that provision to protection for freedom of speech. *See generally* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 441 n.55 (1983). Of the remaining four states in existence when the Bill of Rights was ratified, two—Rhode Island and Connecticut—had not drafted state constitutions; two others—New York and New Jersey—did not provide specific state constitutional guarantees of freedom of press and speech. *See* Leonard W. Levy, *Emergence of a Free Press* 189 (1985).

[8] *See, e.g.*, Act for Punishing and Preventing Oppression, 1635 (amended 1730), The Public Statute Laws of Connecticut 544 (1808).

[9] *See, e.g.*, Act Regulating Licensed Houses, 1791, The Laws of the State of New Hampshire 373-76 (1797); Act to Lay A Duty on Strong Liquors, and For Regulating Inns and Taverns, 1801, Laws of the State of New York 439-43 (1802); Act for Regulating Ordinaries, Houses of Entertainment and Retailers of Spirituous Liquors, 1798, The Public Acts of the General Assembly of North Carolina 122-23 (1804).

[10] *See, e.g.*, Act to Regulate the Exportation of Potash and Pearl Ash, 1792, The Laws of Maryland 191-92 (1811); Act to Regulate Flax-Feed, Pot-ash and Pearl Ash for Exportation, 1785, The Laws of the State of New Hampshire 377-79 (1797).

[11] *See, e.g.*, Act for the Better Making and Measuring of Malt, 1700, The Laws of the Commonwealth of Massachusetts 186 (1807).

[12] *See, e.g.*, Act for Regulating the Exportation of Tobacco and Butter, and the Weight of Onions in Bunches, and the Size of Lime-Casks, 1785, The Laws of the Commonwealth of Massachusetts 320-23 (1807); Act to

these statutes required licenses, prevented charging of unreasonable prices, and set standards for inspection and weighing of commodities. The statutes surveyed, however, reveal no restrictions on the right of these regulated industries to advertise lawful products and services. Sellers were left to their own creativity in seeking to attract attention to their wares. And buyers were protected against potentially false or misleading claims by the common law, tempered by the doctrine of *caveat emptor*. *See, e.g.*, *Borrekins v. Bevan*, 3 Rawle 23, 27 (Pa. 1831) ("[A] sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty that the goods are what they described."); *see also infra* Section I.B.3; *see generally* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L. Rev. 1133 (1931).

The sole limitations placed on advertising restricted the promotion of certain prohibited activities. For example, during the period surrounding the ratification of the Bill of Rights, several states prohibited or restricted lotteries as well as their advertisement and promotion.[15] Massachusetts, for example,

---

(..continued)
Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rosin, Turpentine, Beef, Pork, Shingles, Stoves and Fire-wood, and to Regulate the Weighing of the Merchandise in this Province, 1746, The Public Law of the State of South Carolina 208-10 (1790).

[13] *See, e.g.*, Act Regulating the Admission of Attornies, 1785, The Laws of the Commonwealth of Massachusetts 318-19 (1785).

[14] *See, e.g.*, Act to Regulate the Practice of Physic and Surgery, 1783, Laws of the State of New Jersey 7-8 (1783).

[15] *See, e.g.*, Act for the Prevention of Lotteries, 1792, The Laws of Maryland 189-90 (1811) (prohibiting lotteries as well as their 'propos[al] to the public," absent permission of the legislature); Act for the Suppressing of Lotteries, 1791, The Laws of the State of New Hampshire 339 (1805) (separate penalties for setting up a lottery and "aiding or assisting . . . by printing, or any other ways publishing an account thereof"); Act of Feb. 13, 1797, § 1, The Laws of the State of New Jersey 227-28 (1800) (fining those who print, write or publish any account of where tickets are available, or who "expose to public view, any . . . advertisement or advertisements of or concerning such lottery"); Act to Prevent Private Lotteries, to remit certain Penalties, and to Repeal the Acts therein Mentioned, 1783, Laws of the State of New York 35-38

enacted a statute in 1785 declaring that, with respect to unauthorized—and therefore illegal—lotteries, the act imposed penalties separate fines for setting up lottery and "aiding and assisting in any such lottery, by printing, writing, or in any other manner publishing an account thereof, or where the tickets may be had." Act for the Suppression of Lotteries, 1785, The Laws of the Commonwealth of Massachusetts 252-53 (1807), *amended by* Act of Feb. 28, 1801, *id.* at 8-9 (specifying a fine to be levied upon anyone who "shall aid and assist in any lottery established, or erected in any other of the United States, by advertising any Tickets of such lottery for sale, or by publishing the scheme for any such lottery").

A handful of states prevented the advertisement of other illegal activities. For example, Connecticut and Pennsylvania prohibited staging and advertising horse races. *See* Act to Prevent Horse Racing, 1803, The Public Statute Laws of the State of Connecticut 381-82 (1808); Act Against Horse Racing, 1820, A Digest of the Acts of the General Assembly of Pennsylvania 450-51 (1841). And Rhode Island prohibited the erection of a sign "for the keeping of a public house" without first obtaining an innkeeper's license. Act Enabling the Town-Councils of Each Town In This State to Grant Licenses, 1728, The Public Laws of the State of Rhode Island and Providence Plantations 391-94 (1798). Despite these regulations, however, the state legislatures were not opposed to advertising in general.

(..continued)
(1802) (providing penalties for being "in any ways concerned" with lotteries not authorized by the state, including "printing, writing, or any other ways publishing an account thereof"); Act for Suppressing and Preventing of Private Lotteries, 1762, The Public Law of the State of South Carolina 256-67 (1790) (fining anyone "who shall make, write, print or publish, or cause to be written or published, any scheme or proposal" for a private lottery). Only Pennsylvania completely outlawed lotteries (and their advertisement). *See* Act for the More Effectual Suppressing and Preventing of Lotteries, 1762, A Digest of the Acts of the General Assembly of Pennsylvania 584-85 (1841) (setting 20 pound fine for, *inter alia*, advertising or causing to be advertised any lottery).

3. Common law exceptions to free commercial speech involving false or misleading speech show that the colonial conception of a "free press" included advertising.

The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation (as well as the torts of libel and slander). Sir William Blackstone acknowledged that "every kind of fraud is equally cognizable in a court of law." 3 *William Blackstone Commentaries* *431 (1769). Justice Joseph Story's treatise *Equity Jurisprudence* addressed that "old head of equity," the law of misrepresentation, in detail:

> Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage of him; in every sense there is a positive fraud in the truest sense of the terms.

Joseph Story, *Equity Jurisprudence* § 192 (1836). That liability could accompany this category of speech demonstrates that it was beyond what was understood to be constitutionally protected. A proposed draft of the First Amendment by Thomas Jefferson shows that the free press envisioned by the Framers did not encompass the publication of falsehoods—commercial or noncommercial: "The people shall not be deprived or abridged of their right to speak or to write or otherwise to publish any thing but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations." 15 *The Papers of Thomas Jefferson* 367, 367 (J. Boyd ed., 1958).

Advertisements of unlawful products were also outside the scope of constitutional protection. According to Blackstone, the common law considered it a criminal offense to "procure, counsel, or command another to commit a crime." 4 *William Blackstone Commentaries* *36 (1769) (defining an accessory before the fact); *The King v. Higgins*, 102 Eng. Rep. 269, 276

(K.B. 1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases."); *see generally Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Advertising unlawful products could thus be prohibited at common law as solicitation to commit a crime.

4. Fully protecting advertising is consistent with the Framers' political philosophy, which equated liberty and property.

The inextricable link between commercial and other speech is also reflected in the Framers' political philosophy, which generally equated liberty and property rights. In seventeenth and eighteenth century England there were two reigning justifications for free expression: the idea that free speech "was an instrument to some collective good" and the notion that free speech was a "natural property right of the individual." John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 58 (1996).

In this tradition, freedom of speech and property rights were seen as essential parts of an individual's liberty, an understanding derived from the writings of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." John Locke, *The Second Treatise on Government* 4 (Thomas P. Peardon ed., Bobbs-Merrill 1st ed. 17th prtg. 1975) (1690).[16] As one newspaper commentator put it, "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without

---

[16] George Mason's Virginia Declaration of Rights evidences this Lockean linkage of liberty and property, stating that among the natural rights of man was "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety." Declaration of Rights para. 1 (Va. 1776).

the enjoyment of the other." Boston Newsletter, Feb. 16, 1772, *quoted in* Clinton Rossiter, *Seedtime of the Republic* 379 (1953).

The libertarian Cato drew on Locke in equating liberty and property.[17] Applying this view to the freedom of expression, Cato articulated the importance of free speech and its inextricable link with property rights:

> This sacred Privilege is so essential to free government, that the security of property, and the freedom of speech, always go together; and in those wretched countries where a man cannot call his tongue his own, he can scarce call anything else his own.

John Trenchard & Thomas Gordon, 1 *Cato's Letters* 110 (Ronald Hamow ed., Liberty Classics ed. 1995) (1720-23) (Essay No. 15, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, Feb 4, 1720).

Distinguishing between the value of commercial and noncommercial speech thus would never have occurred to the Framers, who essentially regarded all rights, including the right to free speech, as a form of property right shielded from government interference. James Madison, the drafter of the First Amendment, echoed Locke and Cato, writing:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.

---

[17] *Cato's Letters* were published from 1720 to 1723 and widely circulated in the colonies as "the most popular, quotable, esteemed source of political ideas in the colonial period." Rossiter, *supra*, at 141. His articulation of the tie between property rights and free speech was enormously influential in colonial America. *See* Smith, *supra*, at 25. In fact, Cato's *Essay on Free Speech*, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. *See generally* Leonard W. Levy, *Freedom of the Press from Zenger to Jefferson* 3 (Leonard W. Levy ed., 1996)).

> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, a man has a property *in his opinions and the free communication of them.*

James Madison, *Property*, The National Gazette, Mar. 27, 1792, *reprinted in* James Madison, 14 *Papers of James Madison* 266-68 (Robert A. Rutland & Thomas Mason eds., 1983) (1792) (emphasis in original).

This linkage of liberty and property rights strongly suggests that colonial Americans viewed the First Amendment as protecting far more than political speech. As one contributor writing under the pseudonym 'Philalethes" declared in Boston's *Herald of Freedom* in 1788, that Americans:

> are nurtured in the ennobling idea that to think what they please, and to speak, write and publish their sentiments with decency and independency on every subject[. This] constitutes the dignified character of Americans.

Boston Herald of Freedom, Sep. 15, 1788, *quoted in* Smith, *supra*, at 19. Commercial matters were to be counted among the "subjects" to which the freedom of speech obtained. As leading Anti-Federalist Richard Henry Lee said in his demand for a bill of rights, "A free press is the channel of communication as to mercantile and public affairs." Letter XVI, Jan. 20, 1788, *in An Additional Number of Letters from the Federal Farmer to the Republican* 151-53 (1962). In keeping with the recognition that the Framers sought to guarantee advertising as a critical part of the press, the text of the First Amendment does not distinguish between commercial and noncommercial aspects of the press.

II. THE PERVASIVENESS OF ADVERTISING AND STATE LEGISLATIVE PRACTICE AT THE TIME OF PASSAGE OF THE FOURTEENTH AMENDMENT ARE CONSISTENT WITH THE VIEW THAT COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

An examination of state legislative practices at and around the time the Fourteenth Amendment was ratified confirms that truthful messages about lawful products or services are entitled to full protection. This period marked a robust increase in the prominence and utility of advertising. States, while adopting some restrictions on advertising that reflected the general shift from the common law tradition to statutory law, *see, e.g.*, Morton Keller, *Affairs of State* 347 (1977), continued to focus their regulatory efforts on limiting advertising for illegal products and services.[18]

A. Commercial Speech Was an Integral Part of American Life During Reconstruction.

Advertising was "vigorous and thriving by the mid-nineteenth-century mark." Wood, *supra*, at 158. As one publisher in 1847 observed, "advertising is news. People wanted to read it just as much as they wanted to read the reports of the day's happenings." *Id.* at 159-60. To illustrate, a typical issue of the *New York Herald* in 1860 carried thousands of small-space advertisements. Like many of its colonial counterparts, its front page bore no editorial matter, only advertising. *See id.* at 166-167; Mott, *supra*, at 397-98, 593-94. Only the intense interest in the Civil War supplanted advertising as the front-page material in most papers. *See* Mott, *supra*, at 397; Presbrey, *supra*, at 259. Nonetheless, even in 1869, the *New York Herald* typically

---

[18] This conclusion rests upon an examination of all state codes published closest to 1868. For states with less frequently published codes, the last code published before 1868 and the first one published after 1868 were examined to determine the state of the law at the time of incorporation. The Territorial Codes of Utah, Washington, Wyoming, and New Mexico were also examined. The State Code of Wisconsin could not be found, but the codes of the other thirty-seven states admitted to the union by 1880 were examined.

held eight columns of news, and fifty columns of advertising. *See* Wood, *supra*, at 169.

Although the Civil War may have pushed advertising from the front page, advertising's demonstrated ability to sell Union war bonds led to a vast expansion in its use. *See* Presbrey, *supra*, at 253. A year after the Civil War ended:

> Every rock with surface broad enough, and facing in a direction from which it could be seen, and every cliff which some adventurous painter had been able to climb was daubed over with signs. Every fence, every unoccupied building, the boardings around every large construction site, even the New York curbstones, shouted advertising messages. Fences along the highways and railroad rights of way wore advertising in letters from six inches to two feet high. Bridges, especially covered bridges, bore huge advertising signs.

Wood, *supra*, at 182; *see* Presbrey, *supra*, at 255.

Advertising's prominence also led to other innovations including the first advertising agent in 1841, the first newspaper directory in 1869 and the first market survey in 1879. *See* G. Allen Foster, *Advertising: Ancient Market Place to Television* 48-49, 126-31 (1967); Wood, *supra*, at 142. In 1867, *Galaxy Magazine* described advertising in the United States as having arrived at the point at which:

> the names of successful advertisers have become household words where great poets, politicians, philosophers and warriors of the land are as yet unheard of; there is instant recognition of Higg's saleratus and Wigg's soap even where the title of Tennyson's last work is thought to be 'In the Garden,' and Longfellow understood as the nickname of a tall man.

Presbrey, *supra*, at 255. Advertising had become a major part of American culture.

B. State Legislative Practice During Reconstruction Is Consistent with Full First Amendment Protection for Truthful Commercial Speech Promoting Lawful Products and Services.

As advertising emerged as an increasingly powerful societal force, state governments allowed it to grow unchecked, primarily restricting the promotion of illegal products or services only.[19] The few existing advertising restrictions were aimed at the illegality of the advertised conduct, rather than advertising itself. For example, Delaware prohibited advertising by unlicensed lottery retailers. Del. Rev. Stat. ch. 98, v. 12, § 6 (1874). Similarly, Vermont barred the advertising of lotteries "not authorized by the law of this state or of the United States." Vt. Stat. tit. 34, ch. 119, § 7 (1870).

In response to an aggressive anti-abortion campaign beginning in the 1840s, many states adopted extensive abortion restrictions. *See* James C. Mohr, *Abortion in America* 147-170 (1978). Some laws penalized "[e]very person, who shall, by publication, lecture . . . or by advertisement, or the sale or circulation of any publication, encourage or prompt the commission of [a miscarriage]." Conn. Gen. Stat. tit. 12, ch. 2, § 25 (1866).[20]

---

[19] For example, as before, a number of states restricted lottery advertising. *See, e.g.*, Cal. Penal Code § 323 (1872); Conn. Gen. Stat. tit. 12, § 150 (1866); Del. Rev. Stat. chap. 98, v. 12, § 6 (1874); Digest of Laws of Fla. ch. 80, § 4 (1881); Iowa Code § 4043 (1873); Compiled Laws of Kan. ch. 31, § 342 (1885); Ky. Rev. Stat. ch. 28, art. 21, § 4 (1860 & Supp.); Me. Rev. Stat. tit. 11, ch. 128, § 13 (1884); Md. Code art. 30, § 114 (1860); Miss. Rev. Code § 2605 (1871); Compiled Laws of Nev. § 2498 (1873); N.Y. Rev. Stat. ch. 20, tit. 8, § 53 (1875); Or. Gen. Laws, Crim. Code, ch. 8, § 661 (1874); Compiled Laws of the Territory of Utah § 2002 (1876); Vt. Gen. Stat. ch. 119, § 7 (1870).

[20] *See also* Cal. Penal Code § 317 (1872); Digest of Laws of Fla. ch. 59, § 10 (1881); Compiled Laws of Kan. ch. 31, § 342 (1885); Md. Laws ch. 179, § 2 (1868); Mass. Gen. Stat. ch. 165, § 10 (1860); N.J. Rev. Stat., Crimes § 44 (1874); N.Y. Rev. Stat. pt. 4, ch. 1, tit. 6, § 78 (1875); Ohio Rev. Stat. ch. 2732, § 1 (1860 & Supp.); R.I. Gen. Stat. ch. 232, § 23 (1872); Compiled Laws of the Territory of Utah, Penal Code tit. 9, ch. 8, § 162(4) (1876). Notably, these restrictions applied with equal force to all speech regarding abortion, commercial or noncommercial.

Other then-illegal products or activities that could not be advertised included prize fights,[21] and obscene books.[22] Similarly, West Virginia, New York, and Kansas, like their modern counterparts, barred obscene advertising. *See* W. Va. Code ch. 149, § 11 (1868); N.Y. Rev. Stat. pt. 4, ch. I, tit. 6, § 77 (1875); Compiled Laws of Kan. ch. 31, § 342 (1885).

Despite the absence of legislation barring false and misleading advertising of lawful products and services, as advertising increased, so too did the recognition that, if false, it could cause harm. Beginning around 1864, certain more successful newspapers refused to accept ads for questionable medicines and quacks. *See* Wood, *supra*, at 180. Many papers warned their readers against disreputable advertisers. In 1872, the national government enacted regulations to restrict the dissemination of fraudulent ads through the mail.[23]

To the extent that this Court addressed issues relating to advertising during and immediately after Reconstruction, its decisions were consistent with the view that advertising should be accorded the same protection as other forms of speech. To illustrate, in *Ex parte Jackson*, 96 U.S. 727 (1877), the Court held that Congress's 1868 ban on the advertising of lotteries by mail did not violate the First Amendment. The opinion primarily dealt with Congress's power over the postal system, stating that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded." *Id.* at 732. But this Court treated lottery advertisements in the same way that it treated material that today would be fully protected.

---

[21] Compiled Laws of Kan. ch. 31, § 338 (1885).

[22] Cal. Penal Code § 311(4) (1872); Compiled Laws of the Territory of Utah, Penal Code tit. 9, ch. 8, § 162(4) (1876).

[23] *See* Act of June 8, 1872, ch. 335, 17 Stat. 283 (codified at 39 U.S.C. § 3005 (1994)) (authorizing the Postmaster General, after a hearing, to issue a Fraud Order directing the local postmaster to cease delivering mail or paying postal money orders addressed to a merchant determined to have fraudulently obtained money or property via mail).

III. LESSER PROTECTION FOR COMMERCIAL SPEECH IS A TWENTIETH-CENTURY PHENOMENON THAT HAS ITS ORIGINS IN A DISENCHANTMENT WITH ECONOMIC LIBERTIES AND CONFUSION WITH ECONOMIC SUBSTANTIVE DUE PROCESS.

A. The Pervasiveness of Advertising Grew in the Early Twentieth Century.

Advertising experienced unprecedented growth and prestige in the early twentieth century.[24] By 1898, a survey by the *Press and Printer* of Boston counted 2,583 companies that advertised in regular periodicals of general circulation. *See* Presbrey, *supra*, at 362. Advertisements during World War I helped to sell $24 billion in war bonds to 22 million Americans and raise $400 million for the Red Cross. *See id.* at 565. One observer remarked:

> Advertising did not win the war, but it did its bit so effectively that when the war was over advertising . . . had the recognition of all governments as a prime essential in any large undertaking in which the active support of all the people must be obtained for success.

Id. at 566.

As was the case after the Civil War, this widespread recognition of the power of advertising in war was not lost on manufacturers and retailers when peace returned. Total investment in advertising soared from $1.5 billion in 1918 to

---

[24] The 1904 St. Louis World's Fair recognized the growth of the industry and staged "Ad-Men's Day" with a meeting grandly named "The International Advertising Association." George French, *20th Century Advertising* 119 (1926). Professionalization of advertising continued with the creation of the Advertising Federation of America, which was formed in 1905. *See* Wood, *supra*, at 335. Other advertising groups were formed later, including the New York Advertising League in 1906 and the American National Advertising Managers in 1910. *See* French, *supra*, at 131, 141.

almost $3 billion in 1920 and continued to grow throughout the decade. *See* Wood, *supra*, at 364-365.[25]

B. Disenchantment with Advertising Became Apparent as a Result of Reform Movements and the Great Depression.

As the Gilded Age gave way to the Progressive Era and the notion that civil liberties differed from economic liberties began to take hold, disenchantment with unfettered capitalism, and advertising, grew. *See* Matthew Josephson, *The Robber Barons* 445-53 (1934); *see generally* Richard Hofstadter, *The Age of Reform* (1955). Magazines that had once accepted patent medicine advertisements—such as the *Ladies Home Journal* and *Collier's*—led the charge in 1904 and 1905 against the fraudulent claims made by the industry.[26] *See* Wood, *supra*, at 327-30, 332. Some papers, including the Scripps-McRae League of Newspapers, appointed censors to scrutinize all advertising copy for questionable claims. *See id.* at 334. The public outcry against adulterated and dangerous foods and drugs ultimately led to the passage of the Pure Food and Drugs Act of 1906, which forced manufacturers to justify their claims and list product ingredients. *See id.* at 333.

Because of these and other concerns, the advertising industry in 1911 pushed for a model statute barring "untrue, deceptive, or misleading" advertising. Hurnard J. Kenner, *The Fight for Truth in Advertising* 28 (1936). By 1920, thirty-seven states had adopted the Advertising Federation of America's model antifraud statute, *see* Wood, *supra*, at 336, which largely represented a codification of long-standing common-law restrictions on false or

---

[25] Part of this growth stemmed from the use of radio as a new advertising medium. Although the first radio ad did not air until 1923, by 1929 the industry received an estimated $15 million in advertising revenues for its roughly 500 broadcast stations. *See* Presbrey, *supra*, at 578.

[26] Other targets of early reformers included billboards and other advertising perceived to be littering the landscape and testimonial advertising by celebrities who did not disclose that a fee had been paid for their endorsement. *See* Wood, *supra*, at 347, 392-93.

misleading commercial messages. *See* William F. Walsh, *A History of Anglo-American Law* 328-329 (1932).

The Depression hit advertising hard in terms of both income[27] and, perhaps more importantly, in public esteem. *See* Wood, *supra*, at 418. Critics charged that advertising was wasteful, merely adding to the consumer's cost. *See id.* at 424. Advertising was attacked because:

> There had to be a villain. Advertising as the public voice of industry and business was obvious and accessible to attack. Advertising had been used to urge people to expenditures they could not afford, to lure with false promises, to lull into false security. Advertising was to blame, and shrill cries arose for its annihilation.

Id. at 418.[28] This national mood during the Depression spurred calls for increased restrictions on advertising. The federal government aggressively responded to the perceived excesses of advertising through New Deal enactments.[29]

---

[27] Following the stock market crash, advertising revenues tumbled from $3.4 billion in 1929 to $1.3 billion in 1933. *See* Wood, *supra*, at 417.

[28] Public skepticism about the role of advertising in the American economy rose significantly. The consumers' movement formed during this era, producing best-selling exposés of advertising practices with such lurid titles as *100,000,000 Guinea Pigs, Eat, Drink and Be Wary*, and *Partners in Plunder*. *See* Wood , *supra*, at 419-420.

[29] Indeed, Professor Bruce Ackerman has argued that these and other changes brought about by the New Deal amounted to a decisive watershed in constitutional law. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 510-514 (1989); *see also* David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699 (1991) (defining the New Deal as one of three "First Amendment Eras").

C. The Incorrect Association of Advertising and Economic Liberties Led to the Misguided Distinction Between Commercial and Noncommercial Speech.

Although disenchantment among the body politic with economic liberties led to increased state regulation of the economy, this Court initially dampened that sentiment, employing the doctrine of substantive due process to strike down many state laws. Before 1919, the Court treated political speech as subject to the states' police power, power from which economic activities were relatively free. But:

> The Court did not treat all speech as a political activity subject to government ordinance. Some speech was protected as a valuable economic activity . . . . '[F]ree trade in ideas' became a commercial canon long before it would become the metaphorical key to constitutional protection of political speech.

Rudolph J.R. Peritz, *Competition Policy in America, 1888-1992*, at 100-01 (1996). In contrast to the First Amendment, which this Court had not treated as applicable to constrain state power, the Fourteenth Amendment's due process clause was interpreted to apply to the states.[30]

Thus, most judicial challenges during this period to restrictions on advertising relied on a substantive due process claim that the restrictions interfered with the pursuit of a lawful business rather than advancing First Amendment claims. For example, in *Halter v. Nebraska*, 205 U.S. 34 (1907), this Court upheld a state law barring use of the American Flag on beer bottles. The parties failed even to raise a First Amendment challenge, and instead relied on a due process claim. State courts during this period also analyzed, and in many cases invalidated, challenges to

---

[30] It was not until 1931 that this Court first held that the First Amendment applied to the states. *See Stromberg v. California*, 283 U.S. 359, 368 (1931).

advertising regulations under the rubric of substantive due process.[31]

By the time the Court decided *Valentine v. Chrestensen*, 316 U.S. 52 (1942), however, in which it first stated that advertising was outside the protection of the First Amendment, the notion of substantive due process had been rejected, and review of economic legislation reduced to "rational basis" scrutiny.[32] *Valentine*'s dismissive treatment of commercial speech seems most closely linked to the Court's rejection of economic substantive due process, rather than any evaluation of the First Amendment guarantees envisioned by the Founders. Thus, what has been said about the Contracts Clause may be said about the protection of commercial speech: "misinterpreted as a form of economic substantive due process, [protection of commercial speech] was wrongly discredited when that doctrine [of substantive due process] was rightly discarded." Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 526 (1987).

---

[31] *See, e.g., Seattle v. Proctor*, 48 P.2d 238, 239 (Wash. 1935) (striking down a city statute compelling businesses to disclose "the number of such . . . [articles] and the lowest price at which each of said articles were offered for sale to the public prior to said advertisement"); *Ware v. Ammon*, 278 S.W. 593, 595 (Ky. Ct. App. 1925) (holding unconstitutional a bar on advertising by dry cleaners without the fire marshal's permission to engage in business); *see also State ex rel. Booth v. Beck Jewelry Enterprises, Inc.*, 41 N.E.2d 622, 626 (Ind. 1942) ("Truthful price advertising is a legitimate incident to a lawful merchandising business. Deprivation of the right so to advertise has been held to violate the due process clause of the Fourteenth Amendment.") (citations omitted).

[32] *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions" was not "to be pronounced unconstitutional unless . . . it [does not rest] upon some rational basis."); *see also* Yassky, *supra*, at 1729-1730 (describing the *West Coast Hotel* line of cases as legitimizing the activist state and repudiating the prior era's constitutionalization of rights to property and contract). *But see Needham v. Proffitt*, 41 N.E. 606, 608 (Ind. 1942) (striking down statute prohibiting funeral directors from advertising under state free speech guarantee).

Thus, the differentiation between commercial and noncommercial speech is properly understood as an outgrowth of twentieth-century disenchantment with property rights and economic liberties, and the mislabeling of advertising as a substantive due process right rather than a First Amendment freedom. The distinction between commercial and noncommercial speech, however, is inconsistent with the text and history of the First and Fourteenth Amendments, as well as with the long-standing "traditions of the American people."

IV. THIS PROPOSED INTERPRETATION OF THE FIRST AMENDMENT WILL NOT DRAMATICALLY ALTER THE COURT'S FIRST AMENDMENT JURISPRUDENCE.

Removing the distinction between commercial and noncommercial messages is consistent with most commercial speech cases this Court has decided. Indeed, in most cases, the Court has found restrictions on commercial speech to be unconstitutional. *See, e.g., Greater New Orleans Broadcasting Ass'n v. FCC*, 527 U.S. 173 (1999) (holding that the First Amendment protects broadcast advertisements for casino gambling and gambling-related activities when those advertisements are broadcast from states that permit such gaming activities); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down complete statutory ban on price advertising for alcoholic beverages); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating a federal law barring brewers from displaying alcoholic content of their beers on the products' labels); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down a restriction preventing Florida CPAs from making uninvited in-person visits of telephone calls to potential clients); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down a ban prohibiting newsracks used to distribute commercial handbills on public property). This analysis would also have the impact of avoiding the anomalous results that the *Central Hudson* test occasionally allows. *See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

The proposed interpretation would not, however, prevent government regulation of false and misleading advertising. As shown, the First Amendment has always been understood to allow regulation of such speech. This view is consistent with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), where this Court granted First Amendment protection to commercial speech but held that the government had the power to ensure that commercial messages were not false or misleading. *See id.* at 771-72 n.24. Similarly, the government would not be prohibited from restricting advertising of illegal products and services.[33] Thus, affording commercial speech full protection is consistent with the traditional understanding of the First Amendment and is not contrary to the established precedents of this Court.

V. MASSACHUSETTS' RESTRICTIONS ON TRUTHFUL MESSAGES ABOUT A LAWFUL PRODUCT ARE PROHIBITED BY THE FIRST AMENDMENT.

Assessed under the proper level of scrutiny accorded fully protected speech, Massachusetts' restrictions are clearly unconstitutional.[34] The presence of some children in the audience cannot justify these sweeping restrictions. This does not mean that a bar on tobacco ads in *Boy's Life* or *My Weekly Reader* would be unconstitutional. But the government cannot restrict a

---

[33] Products and services that could not be advertised in the colonial and Reconstruction eras were prohibited in their entirety (*e.g.*, horse-racing and lotteries). Such activities, when lawful, could be advertised. There is no basis for relying on such statutes to uphold advertising restrictions on products that may lawfully be marketed to the overwhelming majority of the population. *See Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 837 (5th Cir. 1989) (noting that protection of commercial speech "would disappear if its protection ceased whenever the advertised product might be used illegally").

[34] As the Petitioners' brief conclusively demonstrates, however, assessed under the *Central Hudson* analysis, Massachusetts' restrictions are unconstitutional. *See* Petitioners' Brief. Certainly, if the regulations were invalid under this lower level of scrutiny, they would fail under the more searching review required for fully protected speech.

truthful message about a lawful product merely because some of those exposed to the message about that product may not lawfully purchase it. Moreover, Massachusetts' regulations are not sufficiently narrowly tailored to serve the government's interest.

CONCLUSION

For the reasons set forth herein, the Court should reverse the First Circuit's decision. In the process, the Court should make clear that commercial speech is to be accorded the same level of constitutional protection as noncommercial speech.

Respectfully submitted,

Of Counsel
Wallace S. Snyder
Jeffry L. Perlman
AMERICAN ADVERTISING FEDERATION
1101 Vermont Avenue, N.W.
Suite 500
Washington, D.C. 20005

Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062

Daniel E. Troy
Counsel of Record
Kristina R. Osterhaus
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for *Amici Curiae*

February 22, 2001